1-1-1990

Situated Decisionmaking

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Recommended Citation
Catharine P. Wells. "Situated Decisionmaking." *Southern California Law Review* 63, (1990): 1727-1746.

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I. INTRODUCTION: SITUATED JUDGMENTS

Increasingly, legal theorists are interested in problems of perspective. The idea that it is possible to make legal decisions in an atmosphere of judicial detachment has seemed less compelling in the face of an increasingly complex and diverse society. As this reality has sunk deeper into the collective unconscious, scholars have begun a reexamination of the phenomena of legal reasoning and legal judgment with a view towards understanding their "situated" character.[1] These theorists reject the notion that there is a universal, rational foundation for legal judgment. Judges do not, in their view, inhabit a lofty perspective that yields an objective vision of the case and its correct disposition. Instead, these scholars understand the role of judging more pragmatically; they recognize that all judges bring their own situated perspective to the case and do the best they can, under all the circumstances, to reach a fair and just disposition.[2]

These differing theoretical perspectives correspond roughly to the roles of agent and spectator as they are invoked in contemporary ethics and epistemology. How we think about questions like "What should I believe?" and "What should I do?" depends in part upon whether we confront them as an agent or as a spectator—as a real participant in the flow of human activity or as a philosopher. This consideration has led many philosophers to adopt agent-centered theories that are "situated" in the sense that the philosopher assesses the rationality of certain beliefs and values with reference not to an abstractly conceived philosophical

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1. *See, e.g.*, Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self Government*, 100 HARV. L. REV. 4 (1986); Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987). The concept of "situated judging" was also a recurrent theme in realist writing. *See, e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); Corbin, *The Law and the Judges*, YALE REV. 234 (1913).

2. *See, e.g.*, Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945 (1988); Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

foundation, but rather to a contingent web of experience and location that provides individual agents with their own particular point of view. These philosophers describe themselves as "pragmatic" and find comfort in Wittgenstein's famous phrase: " 'I have reached bedrock and this is where my spade is turned.' "[3]

When we turn from ethics and epistemology to the rendering of legal judgments, there seems to be an equally helpful distinction to be made between agents and spectators. Common sense tells us that those who are engaged in a controversy will judge its merits differently from those who stand apart. The law recognizes this distinction by requiring that judges recuse themselves from adjudicating any matter in which they have a significant interest.[4] But this requirement does not eliminate the problems that arise from judicial engagement. Judges are not spectators. The judicial role requires that they locate themselves within the situated sphere of activity if only to fulfill their function of rendering judgment. Thus, judging must be viewed as a second-order activity that is distinct from, and logically posterior to, the first-order activities that are the subject of judgment. With respect to first-order activities, judges are supposed to be spectators; with respect to the second-order activity of judging, they are agents. Judges are agents not only because they render particular judgments in particular cases, but also because they participate in the larger task of shaping the development of an adjudicatory tradition.

If we apply the roles of "agent" and "spectator" to the second-order activity of judging, we get two very different images of the judicial role. When we picture judges as "spectators," we expect that they will base their decisions upon a rational foundation of law; when we picture them as "agents," we recognize that they inevitably bring their own distinctive perspective to their consideration of the case. The argument between these two conceptions of the judicial role occupies a central place in the history of American legal theory. Langdell, who conceived of a spectator-judge utilizing rational first principles and deductive logic, has served as a lightning rod for attacks against the possibility of rational foundations.[5] The naive realist, on the other hand, has been accused of undermining the legitimacy of the legal system by introducing the agent-judge

3. H. PUTNAM, THE MANY FACES OF REALISM 85 (1987) (quoting L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 217 (1953)).

4. *See, e.g.*, 28 U.S.C. § 455 (1988).

5. The use of Langdell as a focus for attacks on formalism may not be entirely justified. *See* Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

as an element of corruption and cynicism.[6] For reasons that have been amply stated in the ensuing debate, neither judicial stance gives an entirely satisfactory account of legal judgment. The notion of a rational foundation for law is attractive but intractably elusive; the notion of situated judgment is accessible but offends fundamental ideals of justice and fairness. In a diverse society, the agent-judge runs afoul of such important aspirations as treating like cases alike[7] and making official decisions that are a product of laws rather than persons.[8]

The renewed interest in pragmatism among legal theorists must be viewed in the context of these concerns about situated judging. Pragmatic legal theories reject traditional notions of judicial detachment and emphasize the situated character of legal judgments. They therefore encounter the same dilemma that challenged the realists—being a realist about judging seems to entail being a cynic or a skeptic about justice. The purpose of this Article is to examine the concerns that surround situated judging and the central question to which they give rise: How can a situated judge render a just decision? On its face, the question appears to be both decisive and unanswerable. Upon deeper examination, however, we can see that the question relies upon a doubtful set of presuppositions about situated decisionmaking. It presupposes, for example, that situated decisionmaking is an entirely *ad hoc* and intuitive process. Further, it presupposes that there is an alternative method of decisionmaking that is capable of producing just and principled outcomes. Finally, the objection assumes that pragmatic judges engage in

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6. *See, e.g.*, Lerner, *The Shadow World of Thurman Arnold*, 47 YALE L.J. 687 (1938); Lucey, *Natural Law and American Legal Realism*, 30 GEO. L.J. 493 (1942).

7. Most realists recognize that situated conceptions of judging entail the inevitable conclusion that two judges may legitimately come to different results in the same case. For example, Cardozo describes situated judging in terms of "a stream of tendency . . . which gives coherence and direction to thought and action." B. CARDOZO, *supra* note 1, at 12-13. He argues that "[j]udges cannot escape that current any more than other mortals," and continues, "All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." *Id.* It is this "stream of tendency" that inevitably keeps judges "consistent with themselves and inconsistent with one another." *Id.*

8. For a statement of this aspiration, see R. DWORKIN, TAKING RIGHTS SERIOUSLY 87 (1978) (describing the doctrine of political responsibility as a requirement that "political officials must make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make"). *But see* Radin, *Reconsidering the Rule of Law*, 69 B.U.L. REV. 781 (1989).

the first manner of decisionmaking and that non-pragmatic judges engage in the second.

In the course of this Article, I will try to defend the pragmatic analysis of legal decisionmaking by casting doubt upon these assumptions. In Part II, I will develop two contrasting models of normative decisionmaking that represent the purported distinction between situated and non-situated decisionmaking. In Part III, I will argue that these two models do not represent two alternative decisionmaking procedures. Instead, I will suggest that they describe two interdependent and indispensable parts of any decisionmaking process. Finally, I will conclude that the pragmatic espousal of situated decisionmaking can be understood, not as a rejection of rationally structured decisionmaking procedures, but rather as an elucidation and appreciation of the contextual elements of all forms of deliberation.

II. TWO MODELS OF NORMATIVE DECISIONMAKING

Normative decisions require complex interactions of beliefs, attitudes and feelings. Deliberative styles are highly personal and, even in a specialized context like law, there are no standard protocols for making a decision. In this section, I will describe two distinct approaches to normative decisionmaking that define opposite ends of a continuum. At one end of the continuum is a highly structured procedure of investigation and interpretation that aims at resolving specific cases in accordance with previously established norms of judgment. At the other end is a less structured, more contextual exploration of the case that aims at prompting sound intuitive recommendations concerning its resolution. The first, in effect, transforms the case into an instance of a more general rule; the second recreates the case as an individual narrative that requires an outcome satisfactory to our sense of justice in this particular context. The first places legal structure in the foreground as a central organizing theme; the second brings background to foreground by focusing directly upon the "facts" of the case as they are experienced by the participants.

A. STRUCTURED DECISIONMAKING

Structured decisionmaking treats each individual normative problem as a token that is to be understood in terms of its type. The facts of the case are compared to a general hypothetical type of situation, and the solution to the case is found by applying a rule, standard, or value that is generally recognized as the appropriate touchstone for resolving cases of this type. Factual inquiries are rigorously controlled by conceptions of

relevancy that are built into the recognized classifications. Controversy about the case centers not upon the merits of the proposed solution in this particular case, but upon the appropriateness of the case's characterization as an instance of the chosen type. In short, normative questions are resolved by fitting the case into a preexisting classificatory scheme. Structured deliberations include the following steps:

1. *Selecting a Normative Theory*[9]

Deliberation begins with a decision as to what kinds of arguments should count in evaluating the circumstances presented by the case. For example, the decisionmaker might select a utilitarian theory and thereby decree that arguments will have weight to the extent that they demonstrate that the parties' conduct tends to the net benefit or detriment of society as a whole. The selection of such a background theory will often be tacit or will be seen as given by the nature of enterprise.

2. *Characterizing the Case in General Terms*[10]

The decisionmaker will investigate the case by paying particular attention to the factual issues that seem relevant under the normative theory (s)he has selected. (S)he will thus treat certain details of the situation as central to the normative problem and marginalize or disregard the remainder. For example, suppose the situation involves a deceptive representation made to a member of the green team by a member of the blue team. The decisionmaker could focus on the case either as an instance of a deception or as an instance of blue/green interaction. If the chosen normative theory permits clear conclusions about the utility of deceptive practices but does not speak clearly about the effects of favoring one team over the other, a structured approach requires treating the case as an instance of deceptive conduct rather than as a question of blue/green interaction.[11]

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9. *See, e.g.*, Dworkin's description of a political theory. R. DWORKIN, *supra* note 8, at 91. Dworkin describes a political theory by stating "[a] political theory takes a certain state of affairs as a political aim if . . . it counts in favor of any political decision that the decision is likely to advance, or to protect, that state of affairs, and counts against the decision that it will retard or endanger it." *Id.*

10. Characterizing a case in general terms requires a theory of the case that emphasizes some facts while ignoring others. For example, the classificatory scheme in Blackstone's *Commentaries* provides a way of differentiating one general type of case from another. *See* 1 W. BLACKSTONE, COMMENTARIES xxxvii (4th ed. 1899); 2 *id.* at iii. As these differentiations are made, certain facts become central while others are relegated to an irrelevant residue of particularity.

11. Some critical theories do not reject a structured approach but, in effect, quarrel with the legal categories that determine which facts are relevant. For example, a theory that focuses upon

3. *Analyzing the Case in Accordance With the Chosen Normative Theory*

The decisionmaker might consider how to define the general circumstances under which deceptive conduct would promote or subvert the chosen normative goals.[12] For example, (s)he could decide that a certain amount of "puffing" is beneficial (perhaps it lubricates commerce), but that deceptive claims that are specific enough to induce reliance are detrimental (perhaps they subvert the gains that can be made by informed bargaining).

4. *Selecting a Rule That Will Decide the Case in Accordance with the Chosen Normative Theory*[13]

The decisionmaker might formulate rules of general application that identify practical criteria by which good or benign cases could be separated from undesirable cases.[14] For example, (s)he might use a distinction between misrepresentations as to matters of opinion and misrepresentations as to matters of fact to condemn harmful deceptions while maintaining a lawful place for harmless puffing.

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hierarchies and disparate distributions of power may argue that categories relating to race, gender, or class are more central to the decision of a case than traditional legal categories. *See, e.g.*, C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987).

12. Many judges describe themselves as rule utilitarians. (For a definition of rule utilitarianism see Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).) By describing themselves as rule utilitarians, they mean to say that they decide a case not by focusing on the best outcome for this particular case, but by adopting a rule that produces the best outcome if it is applied in all relevantly similar cases. Judge Traynor, for example, wrote, "A judge, inevitably preoccupied with the far-reaching effect of an immediate solution as a precedent, often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day." Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957).

13. This is perhaps the kind of move Coleman and Kraus have in mind when they claim, "The goal of every theory of institutional rights is to specify a set of rights which will create claims which, when respected, will best promote the goals set forth by the foundational theory." Coleman & Kraus, *Rethinking the Theory of Legal Rights*, 93 YALE L.J. 1335, 1343 (1986).

14. The formal rules need not be "deduced" from the theory but may only be general formulations that seem sound given the underlying values recognized by the theory. For an example of an argument that justifies legal rules in terms of their loose connection with a particular underlying value (reciprocity), see Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

5. *Applying the Rule to the Facts of the Case*[15]

The decisionmaker might reexamine the original case to determine whether its facts fit the categories established in the formal rule. For example, (s)he could decide that the claim "goes from zero to sixty in thirty-five seconds" is a misstatement of fact whereas the claim "a speedy little sports car" is a matter of opinion. If there is no controversy concerning the actual words used by the salesperson and if these words fall neatly into one category or the other, then there is, under this approach, a clearly correct outcome for the case.

B. CONTEXTUAL DECISIONMAKING

Contextual decisionmaking treats a case as an individual set of circumstances that requires resolution upon its own terms. Rather than fitting the facts to preconceived categories of legal significance, the decisionmaker focuses upon the parties' own characterizations of what happened. Inconsistent responses will prompt deeper inquiries concerning viewpoint and perspective. Solution of the problem requires a reconstruction of the underlying circumstances in such a way that differing accounts form a coherent whole. Once the controversy is understood as a coherent whole, it prompts an intuitive response that specifies the appropriate outcome. Understanding a controversy in this way requires that it be experienced from several different perspectives as a developing drama that moves towards its own unique resolution.

A contextual decisionmaker undertakes a number of separate tasks. Typically, these tasks are not performed in any determinate order but are done and redone as the process unfolds. Contextual decisionmaking involves the following steps:

1. *Relatively Undirected Fact Gathering*

The decisionmaker begins by becoming familiar with the general outlines of the controversy. (S)he may speak to participants, to experts, and to anyone who has useful insights or information. (S)he may inspect the site, read documents, or consider extrinsic evidence. The object of this activity is to recreate in the decisionmaker's mind as much of the context and detail as possible.

15. This procedure is the essence of structured accounts of legal method. It is well known to law students as the "A" term of the IRAC (Issue-Rule-Application-Conclusion) formula.

2. *Reconstructing the Event From the Perspectives of the Various Parties*

The decisionmaker imagines the event as it may have appeared from the vantage point of each participant. By successively standing in the shoes of all the various players, (s)he seeks to reconstruct subjective appearances and motivations.

3. *Recreating the Incident as a Coherent Whole*

The decisionmaker constructs a story that is consistent with all the known details and accounts for each character's subjective experience and known motivations.[16] The story aims at plausibility; the actions of every character must be sufficiently supported by his or her goals, state of mind, and perception of the unfolding event.

4. *Forming an Intuitive Response to the Concrete Situation Taken as a Whole*

At any given point, the decisionmaker will have a point of view with respect to the relative praiseworthiness and blameworthiness of the various participants in the incident. Questions of relevancy will not be determined by a pre-selected normative theory. Instead, as the decisionmaker thinks about the case, some details will begin to emerge as particularly salient.[17] (S)he will base tentative conclusions not only upon an emerging grasp of the situation but also upon prior experience of similar matters and perhaps even upon certain preconceptions. Normative intuitions may be affected by all these items whether we regard them as consciously relevant or not.

5. *Self-Criticism: Correcting Intuitive Responses*

Having formed an initial response, the decisionmaker may entertain doubts about its correctness. These doubts arise by reflection upon the limitations that may be inherent in her point of view. Whether these

16. *See generally* R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 22 (1983) (describing the "Story Model" as a model that reflects a "juror's actual cognitive processing").

17. Wiggins has described this kind of deliberation as follows: "A man usually asks himself 'What shall I do?' not with a view to maximizing anything but only in response to a particular context. This will make particular and contingent demands on his moral or practical perception, but the relevant features of the situation may not all jump to the eye. To see what they are, to prompt the imagination to play upon the question and let it activate in reflection and thought-experiment whatever concerns and passions it should activate, may require a high order of situational appreciation." Wiggins, *Deliberation and Practical Reason*, in ESSAYS ON ARISTOTLE'S ETHICS 221, 233 (1980).

doubts can be adequately or even partially resolved is open to question, but it is nevertheless clear, as a descriptive matter, that some process of self-criticism is frequently an important step in coming to a final judgment.

C. Structured and Contextual Justification

Just as the structured and contextual models describe two very different conceptions of normative decisionmaking, they each suggest two distinct forms of justification. With a structured decision, issues of justification center upon the normative theory that has been utilized in the deliberative process: Is the theory the appropriate basis for resolving disputes of this kind? Has it been properly applied to the facts of this case? A contextual decisionmaker, on the other hand, focuses upon the particular circumstances that have created the controversy. Thus, justification for her decision is less abstract and more circumstantial. For example, (s)he might describe her or his deliberative process as a way of showing that (s)he has reached a decision in a conscientious way. In effect, (s)he proclaims: "This is the best I could do under all the circumstances of this case." Such justification is inherently "pragmatic" in the sense that it recognizes that even good decisions are subject to the limitations of perspective and viewpoint.[18]

In the context of legal decisionmaking, the problem of justification is complicated by the demand that cases should be decided in accordance with law. Many structured judges, for example, justify their decisions by a two-step process: first, does the outcome result from a correct application of a correct legal rule and, second, is the legal rule justified by a larger normative theory.[19] Under this approach, legal theory seems to require increasingly abstract statements of "the law" and correspondingly abstract theories of justification. Contextual judges, on the other hand, resort to less universal forms of justification that may seem problematic in a legal context. While they rely upon their intuitions in reaching a decision, they justify their decisions by writing opinions that appeal

18. The outcome of a contextual analysis may, of course, agree with the requirements of some normative theory, but this fact is incidental to the process of justification. In a conflict between what the theory seems to require and a decisionmaker's own intuitive sense, truly contextual decisionmakers follow their intuitions rather than the theory.

19. Some judges, of course, view themselves as simply following the law without regard to underlying normative considerations. They do not, however, lack a normative theory because they presumably believe that judges ought to follow whatever sources of law they have invoked to decide the case.

to traditional sources of legal authority.[20] This has led many legal scholars to question the authenticity of contextual justification. Some scholars argue that it is inappropriate for a judge to cite reasons that (s)he does not herself find persuasive.[21] Others simply point out that nearly every legal outcome could be justified by this kind of *ex post* justification. Since the end of the realist movement, these arguments have been widely viewed as decisive with the vast majority of legal scholars, one group of legal scholars believing that legal decisions require structured justification and another group believing that all legal decisions are inherently arbitrary.[22]

In the context of this analysis, the pragmatist seems to embrace several contradictory positions. First, (s)he concedes that *ex post facto* justifications are not adequate justifications for legal outcomes. On the other hand, (s)he also believes that structured theories fail to provide the kind of timeless and universal justification that the theories themselves seem to require. But, despite the fact that the pragmatist rejects these two major forms of justification, (s)he also believes that justification for legal decisionmaking is both necessary and possible. In the remainder of this Article, I will suggest that this position is not so contradictory as it seems. Rather, the contradiction seems fatal only in the context of a vastly oversimplified model of normative decisionmaking. By developing a more complex model of normative decisionmaking, we can begin to develop a notion of justification that has both structured and contextual elements.

III. LEGAL ADJUDICATION

As a descriptive matter, it seems clear that legal decisionmaking has both structured and contextual elements. The structured elements are highly visible in the simplest reconstructions of legal method. The contextual elements are less visible but can be seen in the common law preference for case-by-case adjudication, in relaxed standards of evidential relevance, and in the use of juries to resolve legal controversies.[23] In this section, I will develop the distinction between structured and contextual decisionmaking with a view towards showing that neither can operate

20. *See, e.g.*, J. HUTCHESON, JUDGMENT INTUITIVE 20-34 (1938).

21. For a fuller discussion of this criticism, see Altman, *Beyond Candor*, 89 MICH. L. REV. — (1990) (forthcoming).

22. *See, e.g.*, Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986).

23. *See* Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. — (1990) (forthcoming).

independently of the other. Thus, the fact that legal adjudication displays elements of both models should not surprise us.

A. THE TWO MODELS COMPARED

The two models of normative decisionmaking are sometimes contrasted by using words like "abstract," "rational," "universal," and "rule-bound" to characterize structured decisionmaking and opposing words like "concrete," "intuitive," "particular," and "case-specific" to characterize contextual decisionmaking. But these characteristics are misleading in several ways.

First, the difference between structured and contextual decisionmaking is not in the type of mental operations that they employ; both models require the use of abstraction, reason, and intuition. We cannot, for example, engage in contextual decisionmaking as I have described it without recreating the central events from several different viewpoints. This step requires the use of both abstraction and reason.[24] On the other hand, structured theorists frequently appeal to intuition[25] as a justification for certain parts of their analysis.[26]

Second, the two models are not adequately characterized by contrasting pairs of terms such as "general" and "particular" or "universal" and "concrete." These are relative terms.[27] A case may be described as "an auto accident," "a hit and run," "an accident on Main Street on December 3rd," "an accident between Mr. Smith and Ms. Jones," or even as "an accident between Mr. Smith and Ms. Jones on Main Street on December 3rd," and it will still be a general description. Descriptions are always general and general terms are always necessary to describe "particular" facts. The "facts" of a legal case are inevitably only descriptions of fact,[28] and these descriptions are not identical with the concrete circumstances that gave rise to the case. On the one hand, we are able to talk about a "case" only if the descriptions are specific enough to pick

24. One cannot compare what A saw with what B saw unless one is able to abstract the individual perceptions of A and B from their respective viewpoints.

25. The term "intuition" is used in many ways: it is sometimes used as I am using it to denote a nonstructured judgment about the merits of a particular case, but it is also sometimes used to denote a general claim for which reasons or proof need not be given. Proof may not be necessary for a number of reasons, the most common of which is an expectation that the listener's intuitions will not differ.

26. An example of such an appeal to intuition is when a theorist says—"My intuitions say that personal dislike does not justify murder."—and so declines to treat personal animosity as an excuse for murder.

27. Or as Dworkin would say, a "distinction of degree." R. DWORKIN, *supra* note 8, at 93.

28. Indeed, they are value-laden descriptions of fact. *See* Part III, Section C below.

out a unique set of circumstances. On the other hand, the "case" is not a specific occurrence but an amalgam of descriptions of the circumstances surrounding the occurrence. In thinking about contextual decisionmaking, it is important not to confuse the legal "case" with the concrete circumstances that generate it. Contextual decisionmakers may be more concerned with factual detail and complexity, but they are nevertheless entirely dependent upon general descriptions. Even a wealth of description will not recreate, except in a metaphorical way, the actual event being investigated.

Third, the use of terms like "rule-centered" and "case-specific" to describe these models is also misleading. On the one hand, it is true that the structured model focuses on categories and criteria while the contextual model focuses on specific circumstances. On the other hand, the conception of rule-centeredness itself is open to widely varying interpretations. Several generations of legal theorists have analyzed the role of legal rules in resolving individual cases. This considerable body of literature has generated a diverse array of understandings about what it means to decide a case in accordance with a legal rule. Are rules prescriptive statements of the form, "If x and y are true, rule in favor of the plaintiff"? Or are they to be understood as a particular hierarchy of values? Because there is no consensus surrounding the use of the word "rule," its meaning is often imprecise and it is therefore not very helpful in analyzing normative decisionmaking. Furthermore, the designation "rule-centered" is deceptive in overlooking the diversity of legal theories that could be considered structured theories. It is true that structured theories invoke rules, standards, or values as a part of their procedure, but that is not a full description of the strategy. For example, Dworkin clearly does not believe that legal decisions result from applying a formal rule to the facts of a controversy; nevertheless, he pursues a structured approach to normative questions. His Hercules begins with a political theory, a theory of legislation, and a theory of precedent, then, with "superhuman skill, learning, patience and acumen,"[29] fashions a result that accords with those theories. In short, Hercules need never retreat to his own contextual judgment of the concrete case because "his theory identifies a particular conception of community morality as decisive of legal issues."[30] Dworkin's Hercules may not be a simple rule follower, but his approach is clearly structured in the way outlined above.

29. R. DWORKIN, *supra* note 8, at 105.

30. *Id.* at 126.

B. The Interdependence of Structured and Contextual Analysis

For the reasons discussed above, it is an oversimplification to think of the structured and contextual models as two separate ways of making a decision. Instead, we can understand each model as describing a set of activities that are essential to normative decisionmaking. In this respect, an analogy will be helpful.

Imagine that a traveller is lost in the middle of nowhere and that it is imperative that (s)he get home. The structured approach resembles the approach we would use if (s)he could give us a signal that would locate her on a giant map. In order to locate her specific position and direct her to her destination, it would be necessary to zero in on her by employing a series of maps that cover successively smaller territories. The location on the large map would give us coordinates that we could use to select a more detailed but less extensive map that also contained the specific location. The location would then be extrapolated onto the second map and new, more exact coordinates would be obtained. The process would be repeated until a map was found with sufficient detail that we could identify the road on which our traveller stood and the exact location of her home. The use of a structured approach to solve normative problems presupposes that we have a very large map (i.e. a reason to prefer one normative theory to another) and that we are able to locate the traveller (define the problem) within the map (in terms of the theory) by means of coordinates (i.e. morally relevant features) that are contained on the map (in the theory) itself. It assumes that both the maps and the signal that places the traveller on the map are accurate.

The contextual approach is the approach we would use if we could locate the traveller but had no map. We would join the traveller and begin to explore. We would try various roads, ask any people we met, and begin to construct our own tentative map of the immediate vicinity. In short, we would look for any clues that we could find until we were able to lead the traveller home. This process could be very time consuming or, with some luck, we might complete it relatively quickly. The use of a contextual method to solve normative problems presupposes that we have no map or only a partial one. The only means of investigating the problem is to exploit our potential connection with it. We can put ourselves in the traveller's shoes, but we can not locate her in the larger universe.

The two approaches represent the difference between zeroing in on a spot from afar or starting with the spot and working our way outward. The virtue of the first approach is that it removes us from the traveller's subjective situation into an objective but abstract conception of her terrain. The strength of the second approach is that it brings us closer to the problem by placing us "on the spot." Despite these apparent differences, it is clear that the two approaches are strongly interrelated. The objectivity of the mapmaker's space is achieved by abstraction and reason, but abstraction and reason, by themselves, are not effective tools. Their usefulness depends upon the accuracy of the information that they analyze. Thus, making a map requires keen "on-the-spot" observation of real geographic areas. Similarly, the "situated" rescuer cannot rely solely upon observation. To be effective, (s)he must make at least some effort to map out, i.e., to record and interpret, what (s)he sees.

It is tempting to draw a distinction between maps and observations that is based on the idea that individual observations are situated while maps are not. On the one hand, individual observations are "situated" in the sense that they are each made relative to an individual viewpoint. On the other hand, maps seem to be less situated in that they are constructed from observations that have been obtained from more than one viewpoint. Even so, maps can never be entirely free of perspective. Consider two different maps: One is drawn by a giant who is hunting tigers; the other is drawn by a Lilliputian who is seeking a sunny place for a nap. Will these two maps look the same? Which one is more objective? Are footprints or rays of sunshine the objective features of this terrain?

The analogy between mapmaking and legal adjudication suggests two things about structured and contextual decisionmaking. First, it suggests that we should not view the structured and contextual analyses of legal adjudication as an either/or proposition. Instead, we should recognize that decisionmakers cannot create a particular structure unless there is a willingness independent of the structure to commit themselves to the correctness of some individual decisions in some individual cases. Thus, even the most abstract forms of deliberation ultimately rely upon contextual decisions. Second, the analogy suggests that even the structured elements of legal decisionmaking are themselves situated. Legal rules do not necessarily begin with first principles; they may begin, like mapmaking, with observations of what seems to be an appropriate response to an individual case. Thus, a legal analysis cannot be perspective free if the categories it uses arise from a decisionmaker's (or a group of decisionmakers') experience in adjudicating cases. Inevitably, what

these decisionmakers come to regard as salient and objective features of the decisional terrain will depend upon their own particular situation. This means that the structures that are used to analyze cases are themselves situated in a particular history of adjudicating cases and in a particular set of purposes for engaging in adjudicatory activity.

C. The Interdependence of Factual and Normative Judgments

Many theorists would deny that there is a useful analogy between the traveller's dilemma and the decision of a legal case. Their objection centers upon the nature of evaluative judgments. The traveller's problem, in their view, is factual and is therefore most readily solved by a combination of particular observation and accumulated knowledge. An evaluative judgment, on the other hand, differs from a factual one in that observations of, or intuitions about, concrete circumstances are inherently untrustworthy. It is clear, they argue, that individual normative responses undergo significant variations as a result of such subjective factors as mood, prejudice, and self-interest. Because of this variation, the argument continues, normative theory should be based upon rational arguments rather than contextual intuitions. Or, to put the point in terms of the mapmaking analogy, normative decisionmakers who place themselves "on the spot" are sure to lose their way in a tangle of unreliable and subjective impressions. Thus, the argument continues, reliable "maps" of normative terrain can be drawn only from a detached and objective stance.

The alternative to "on-the-spot" moral judgments are detached normative theories that begin with first principles and lead to conclusions about particular cases. Examples include the utilitarianism of Bentham and Mill, Kantian theories of deontic obligation, and Rawlsian conceptions of justice and fairness. These theories solve the problem of value by appealing either to self-evident principles such as the value of human utility or to principles that are derived from such worthy conceptions as personhood or justice. The consequent distinction between fact and value excludes the possibility that legitimate judgments of value can be made intuitively by simple observation of an individual case.

Despite the analytical clarity of this distinction between facts and values, the distinction is extremely problematic when we attempt to apply it to the normative decisionmaking of ordinary life. Intuitive normative judgments are an essential and pervasive feature of human experience. For example, we choose a particular route to get to work; we

decide to spend more time with our children; we call a questionable tennis serve in or out; we work late so that we can do a better job; or we take time to help a person find something (s)he has lost. We are confronted hourly with demands upon our attention that we can ignore or to which we can respond. Sometimes we decide in accordance with previously articulated principles; most of the time we simply have a "feeling" about such situations.[31] On the basis of this feeling, we believe that certain things ought to happen; under certain circumstances, we are even moved to try to make them happen.[32] This feeling rarely comes to us as the result of conscious application of previously enunciated standards of judgment. Rather, it is a response to a situation taken as a whole—a signal of our "individual stance" with respect to that situation.[33] In responding, we see not only that certain things have been done but also that we favor or oppose those things. In short, we not only perceive an event but we develop an attitude towards the event that, in turn, focuses our attention and colors further perceptions.

When we examine experience in this way, it is clear that a sharp distinction between factual observations and normative judgments cannot be maintained. What we see and hear is filtered and interpreted within a cognitive framework that is constructed largely from our own individual temperament and prior experience.[34] Normative judgments in particular cases are strongly influenced by perceptions about the nature of the controversy within this larger framework. Thus, reality is not something that can be easily or naturally reported as a series of simple observations. Instead, we are enmeshed in scores of overlapping dramas,

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31. I use "feeling" in this context because I believe this is how it is ordinarily described. In using this term, I do not mean to commit myself to placing moral intuitions within any particular framework of perceptual or emotional judgments.

32. For a phenomenological description of this way of evaluating day-to-day decisions, see C. PEIRCE, *Questions Concerning Certain Faculties Claimed for Man*, in 5 THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 5.213 (C. Hartshorne and P. Weiss eds. 1934) [hereinafter COLLECTED PAPERS].

33. The pragmatists placed all normative decisionmaking within a context of beliefs, desires, and habits. In speaking of an "individual stance" with respect to a given situation, I mean to refer to such a context.

34. *See, e.g.*, C. PEIRCE, *Pragmatism and Abduction*, in COLLECTED PAPERS, *supra* note 32, at 5.185 ("We see what we are adjusted for interpreting, though it be far less perceptible than any express effort could enable us to perceive; while that, to the interpretation of which our adjustments are not fitted, we fail to perceive although it exceed in intensity what we should perceive with the utmost ease, if we cared at all for its interpretation."); *see also* A. GEORGE, PRESIDENTIAL DECISIONMAKING IN FOREIGN POLICY: THE EFFECTIVE USE OF INFORMATION AND ADVICE 61-62 (1980), *quoted in* Thompson & Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 ARIZ. ST. L.J. 1, 51 n.200 (1986) (Man " 'displays a strong tendency to see what he expects to see and to assimilate incoming information to the images, hypotheses, and theories he has already formed.' ").

and our experience of the facts is shaped, in part, by the dramatic roles we play.

It is possible, of course, to make conscious efforts to cleanse our perceptions of their more obvious evaluative elements. We might, for example, say "John approached the group" rather than "John approached the group like a mean son-of-a-gun." But the most scrupulous efforts at impartiality will not restore the details lost as a result of selective attention nor will they permit us to come to a neutral judgment about the facts. I might recognize, for example, that my belief in X's truthfulness is a product of my bias. Nevertheless, this recognition will not necessarily lead to a less partisan view of "the facts." When I discount my estimate of X's credibility, I can't simply conclude that X is lying. Nor is it possible to measure the effect of my bias on the strength of my feelings and to reduce those feelings accordingly; I cannot simply order up a new and corrected sense of the situation. While recognition of bias may be an important step in improving our understanding of a situation, it will not necessarily provide us with a sanitized version of the facts of a case. This does not mean that we cannot make, under some circumstances, factual observations that are relatively untainted by our normative attitudes. We can, for example, make efforts to ensure that scientific observations in a controlled experimental setting are relatively factual.[35] But there is a natural limit to these kinds of efforts, and this is especially true when they are taken outside the laboratory.

In the legal context, the rules governing admissibility of testimony attempt to exclude the most obvious evaluative statements. Nevertheless, witnesses do not observe events under experimental conditions, and trials do not resemble scientific experiments. Controlled observation is not the experience of daily life nor is it the experience that legal testimony describes. Legal testimony is "histrionic" in the sense that it is the telling of a story by one who is a part of the story.[36] Witnesses may be minor characters, but they are nevertheless a part of the story; their view of the facts is as dependent upon their normative position as it is upon their physical viewpoint.

Considerations like these suggest that legal decisionmaking may well be like mapmaking after all. It is true that intuitive normative

35. I say "relatively factual" because of the familiar problems of observer bias and experimental design. Some philosophers raise doubts about whether scientific results are even relatively factual. *See, e.g.*, P. FEYERABEND, AGAINST METHOD (1975); T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

36. "Histrionic" has two senses: (1) dramatic, emotional, affected, and (2) of or having to do with actors or acting. In choosing this term, I mean to invoke both connotations.

responses are somewhat unreliable, but it is equally true that they cannot be easily discarded in favor of rational first principles. It is also true that there can be no unbiased and sanitized version of *the* facts of a case to which such principles can be applied. Instead, the legal enterprise is a complicated endeavor that aims at reaching a considered normative judgment in the face of a confusing array of participant accounts. Such judgments are relative to a perspective; they are situated in prior experience and affected by normative attitudes. They are based upon complex, if not fully conscious, estimates of the relative soundness of each party's case.

IV. CONCLUSION: SITUATED STRUCTURES

In this Article, I have argued that normative decisionmaking requires the simultaneous operation of two distinct deliberative procedures. Each procedure is incomplete: structured reasoning ultimately presupposes a variety of contextual judgments and contextual judgments, in turn, are not truly useful unless they are incorporated into a framework that imposes a structure on the surrounding terrain. Thus, a belief in situated decisionmaking does not entail the abandonment of structuring methods such as reason, generalization, and abstraction. Instead, it recognizes that there is more to legal decisionmaking than the mechanical application of these techniques and, for this reason, it sees all legal reasoning as "situated" in the sense that it operates within a structure that is constructed by the decisionmaker's own unique mode of participation in the ebb and flow of human events.

For the pragmatist, all theoretical structures must be understood in terms of the real world practices that generate them.[37] In addition—and this point needs emphasis—some theoretical structures are not only relative to a practice but also relative to a certain subset of participants in the practice. What you observe and how you categorize depends, in part, on who you are and what you seek. Thus, the judgment that a given normative structure is "logical" or "useful" must be understood in relation to the purposes that render it so. For example, the practice of surrogate parenting has raised a variety of legal issues. Underlying these issues are differing assumptions about the essential nature of the surrogacy arrangement. This poses the question: With whose experience should we try to empathize when we are constructing a legal analysis of this controversial issue? From the point of view of a couple who provide a fertilized ovum to a surrogate mother, the practice might be described as the rental of a

37. This is simply an application of the pragmatic maxim. *See, e.g.*, C. PEIRCE, *How to Make Our Ideas Clear*, in COLLECTED PAPERS, *supra* note 32, at 5.388.

womb.[38] They "possess" a fetus and they are seeking to "rent" a place where it can grow. But the "rental" characterization will likely seem inadequate to the surrogate mother. Indisputably, she is pregnant. From her point of view, there is more going on than a commercial lease. She is engaging in genuine acts of mothering. The question—"Should surrogate parenting be described as womb rental or as a form of parenting?"—recalls a similar question about hunting tigers—"Should we describe the hunt from the hunter's point of view or from the tiger's?"

My point in all this is not skeptical. A pragmatist can recognize that judges do not render their judgments from "nowhere"[39] while still not denying that just outcomes are possible. The recognition that legal judgments are situated is the first step towards an authentic ideal of fairness. If our judgment is inevitably limited by our perspective, then consideration of the character of that perspective is the beginning of rational inquiry. The point of this inquiry is a form of justice that is not rooted in images of detachment and remoteness. Rather it is contained in two related commitments: first, a commitment to be scrupulously honest about the limits of one's own particular viewpoint and, second, a commitment to be genuinely open to understanding and respecting the viewpoint of others. These are serious commitments. To honor them, we must cultivate more flexible approaches to normative problems; we must abandon the pretense that our methods of analysis are universally correct; and we must learn to speak in ways that do not obscure the origins of our judgments in experience and desire. By recognizing the situated character of abstract reasons and structures, we make it possible to consider what reasons and structures are pragmatically appropriate to a particular decision and, in explicitly addressing this question, we move closer to fulfilling our aspiration for a genuinely just form of adjudication.

38. *See* Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 27 (1989). Note that other surrogate parents might see it differently. "Womb renters" are one kind of player. It is possible, of course, that there can be other kinds of players. For example, some couples may genuinely seek to engage in a practice of cooperative planning for a child. Again this is the difference between giants hunting tigers and Lilliputians seeking a sunny place for a nap. *See supra* Part III, Section B.

39. T. NAGEL, THE VIEW FROM NOWHERE (1986).